PREMAH KARUPIAH

v.

ARAB MALAYSIAN EAGLE ASSURANCE BHD

HIGH COURT MALAYA, PULAU PINANG
SU GEOK YIAM JC
[CIVIL APPEAL NO: 12-267-2002]
25 JUNE 2003

INSURANCE: *Life insurance - Trust of life policy in favour of wife - Non-payment of monthly premium - Whether such breach waived by respondent's conduct - Whether policy discharged by death of deceased*

This was the appellant's appeal against the decision of the sessions court dismissing the appellant's claim under a whole life policy ('the policy') purchased by the appellant's deceased husband ('the deceased') from the respondent whilst he was alive. The deceased, who had purchased the policy in favour of the appellant, had defaulted on paying the monthly premium – due on the second day of each month – for the month of October 1994. By a letter dated 18 November 1994 ('the first letter'), the respondent informed the deceased that the policy had lapsed and that if he intended to have it reinstated, he must submit a declaration that he was of good health and pay all overdue premiums as at 30 November 1994 within a period of 30 days from the date of the letter ('the extended period'). However, the deceased passed away in a road accident on 17 November 1994, which was one day before the respondent issued the first letter. The appellant did not inform the respondent of the deceased's death until she made a claim against the respondent on 15 February 1995. By a letter dated 22 March 1995 ('the second letter'), the respondent informed the appellant that it was unable to consider her claim as the policy had not been in force at the time of the deceased's death.

The issues that required determination were whether: (1) the premium for October 1994, which, on the facts, was credited into the respondent's account on 16 December 1994, was paid within the extended period; (2) alternatively, in accepting payment of the premium on 16 December 1994 for the month of October 1994 when it was actually due on 2 October 1994 and which was to be paid within the extended period, the respondent had waived the deceased's breach of the policy and had treated the policy as still in force in spite of the first letter offering to reinstate the policy; and (3) the deceased's death had caused the policy to be discharged so as to disentitle the appellant, who was the beneficiary, from claiming under the policy.

Held:

[1] In respect of issue (1), the premium for October 1994, which was credited into the respondent's account on 16 December 1994, was paid within the extended period. (p 206 g)

[2] In respect of issue (2), applying the relevant principles of waiver to the facts in the instant case, in particular, the principle that there must be a voluntary grant of a concession, whether before or after a breach of the term alleged has been waived by one party to the other party, by not insisting on the precise time for performance provided for in the contract, the only conclusion was that there was no waiver because when the respondent accepted the late payment of the premium on 16 December 1994, the respondent was not aware that the deceased had in actual fact already passed away. It also followed that the appellant's arguments that the respondent had, by its previous conduct in accepting late payments of the premium, waived strict compliance by the deceased of the time stipulated for the payment of the monthly premium, was also without merits and ought to have been rejected. Furthermore, at the time of his death, the deceased not only failed to pay his premium for October 1994 within the extended period, he also did not pay his premium for November 1994. (pp 210 d-e & 211 c-d)

[3] The general rule is that the death of one of the parties to a contract does not discharge the contract. However, where the contract is of a personal nature, the general rule does not apply and such a contract will be discharged as an important element in the contract. As the death of the deceased made it impossible for him to comply with the two conditions for the reinstatement of the policy, it was consequently discharged by the deceased's death on 17 November 1994. (p 211 g-h & 212 a)

[Appeal dismissed.]

Case(s) referred to:

Acey v. Fernie [1840] 7 M & W 151 ***(refd)***

Banning v. Wright (Inspector of Taxes) [1972] 2 All ER 987 ***(foll)***

Bird v. Hildage [1948] 1 KB 91 ***(refd)***

Cape Asbestos Co Ltd v. Lloyds Bank Ltd [1921] WN 274 ***(refd)***

Pritchard v. Merchants' and Tradesman's Mutual Life Assurance Society [1858] 3 CBNS 622 ***(refd)***

Ross T Smyth & Co Ltd v. Bailey Son & Co [1940] 3 All ER 60 ***(refd)***

Salvin v. James [1805] 6 East 571 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 40

Other source(s) referred to:
Halsbury's Laws of England, 4th edn, para 571, p 394; para 574, p 396; para 615, p 422

For the appellant - Norizan Ahmad; M/s Athimulan & Co
For the respondent - Chang Mei Leng; M/s Murad & Foo

Reported by Suresh Nathan

JUDGMENT

Su Geok Yiam JC:
This is an appeal against the decision of the Sessions Court, Georgetown, Penang dated 8 July 2002 dismissing the appellant's claim under a whole life policy purchased by the appellant's deceased husband from the respondent whilst he was alive.

Facts
The facts as set out in the judgment of the learned Sessions Court Judge are, briefly, as follows:

The appellant's deceased husband ("deceased") whilst he was alive had, on 29 April 1994, purchased a whole life insurance policy ("policy") from the respondent in favour of the appellant. The maturity date of the policy is 2 May 2019. He paid the monthly premiums amounting to RM55.45 each which was due on the 2nd day of each month by way of monthly deductions from his Giro savings account with the Bank Simpanan Nasional. He defaulted on his monthly premium for the month of October 1994. By a letter dated 18 November 1994 ("first letter"), D6, the respondent notified him that his policy had lapsed and informed the deceased that if he wanted to reinstate his policy he could do so by submitting a declaration that he was of good health and paying all overdue premiums inclusive of interest amounting to RM110.10 as at 30 November 1994 within 30 days from the date of the letter ("the extended period"). The sum of RM110.10 included a sum of RM109.40 which represented the overdue premiums for the months of October and November 1994 which were due on 2 October 1994 and 2 November 1994, respectively.

Unfortunately on 17 November 1994 which was 15 days after his policy had expired and a day before the respondent issued the said letter the deceased passed away in a road accident.

The appellant did not inform the respondent of the deceased's death until 15 February 1995 when the appellant made a claim against the respondent.

By a letter dated 22 March 1995 ("second letter") the respondent informed the appellant that it was unable to consider the appellant's claim as the policy was not in force at the time of the deceased's death on 17 November 1994. The respondent also refunded to the appellant a sum of RM56.95 being the premium for the month of October 1994 which it had accepted on 16 December 1994 because it was not aware that the deceased had passed away on 17 November 1994.

In the second letter the respondent gave the following explanation:

> Our records show that the last monthly premium outstanding under this policy was due 02 Oct 94. This premium was not paid within the period allowed under the policy. At time of death of the deceased on 17 Nov 94, the monthly premiums due 02 Oct 94 and 02 Nov 94 were outstanding. We received the sum of RM55.45 on 16 Dec 94 after the date of death, being premium deposit.
>
> The details of transactions in respect of the BSN-GIRO Accounts No. 5-4001563-7 of the deceased is reproduced below for your attention:

Date of Transaction	Amount Banked-in (RM)	Amount Deducted (RM)	Balance (RM)	Remarks
06 Apr 94	15.00	15.00	Insufficient for deduction 02/07/94	
04 Jul 94	60.00	75.00		
29 Jul 94	60.00	135.00		
02 Aug 94	55.45 (1)	79.00		
02 Sep 94	55.45 (2)	24.10		
05 Sep 94	60.00	84.10		
01 Oct 94	55.45 (3)	28.65	Insufficient for deduction 02/11/94	
04 Nov 94	60.00	88.65		
01 Dec 94	55.45 (4)	33.20		

> These premium deductions were utilised for premium payments due under the above life policy as follows:

Date of Payment	Premium Due	Amount Paid (RM)	Days taken to settle the premium
02 Aug 94 (1)	02 Jul 94 & 02 Aug 94	53.95 1.50	31 days
02 Aug 94 (2)	02 Aug 94 & 02 Sep 94	53.95 1.50	31 days
01 Oct 94 (3) 02 Oct 94 1.50	02 Sep 94 &	53.95	31 days
16 Sep 94 (4)	02 Oct 94 & 02 Nov 94	53.95	60 days (Amount 1.50 held as premium deposit)

The monthly premium due 2 October 1994 was not remitted during the grace period allowed. By virtue of the terms and conditions of the policy, the policy had lapsed effective from 2 October 1994 and was no longer in force with effect from this date.

I understand the second letter to mean that the respondent was rejecting the appellant's claim on the grounds that by virtue of the deceased's death on 17 November 1994 and the non payment of the premiums for the months of October and November 1994 which were due on 2 October 1994 and 2 November 1994, respectively, within the grace period of 30 days as allowed under the policy the policy had lapsed.

Hence this appeal by the appellant.

Grounds Of Appeal

The appellant has relied on the following grounds as set out in the memorandum of appeal:

1. that the first letter clearly shows that the respondent had granted to the deceased an extension of time to pay the insurance premium for the month of October 1994 within 30 days from the date of the first letter, ie, 18 November 1994 which period would only expire on 18 December 1994 ("the extended period");

2. that the deceased's Giro passbook, P3, shows that the insurance premium for the month of October 1994 was debited from the respondent's account on 1 December 1994 and credited into the respondent's account on 16 December 1994 which was well within the extended period; and

3. alternatively, that s. 40 of the Contracts Act 1950 is applicable and that the respondent has waived the delay in the payment of the premium for the month of October 1994 because although the policy had expired, the respondent did not terminate the policy and the deceased continued to pay the monthly premium for the month of October 1994 and the respondent continued to receive the monthly premium for the month of October 1994 and the respondent only cancelled the policy on 22 March 1995 upon the appellant making a claim on 15 February 1995 against the respondent under the policy.

Decision Of The Court

On 11 April 2003 after hearing submissions from both the learned counsels the court initially allowed the appeal with costs and set aside the order of the Sessions Court. However, upon realising that it had erred in doing so, the court recalled the case the very same day, vacated the earlier order, dismissed the appeal with costs and upheld the order of the Sessions Court.

Issues

The issues for the determination of the court are as follows:

1. whether the premium for the month of October 1994 which was credited into the respondent's account on 16 December 1994 was paid within the extended period;

2. alternatively, whether in accepting payment of the premium on 16 December 1994 for the month of October 1994 when it was actually due on 2 October 1994 and which is to be paid within the 30 days grace period the respondent had waived the deceased's breach of the policy and had treated the policy as still in force in spite of its first letter to the deceased offering to reinstate the policy; and

3. whether the death of the deceased on 17 November 1994 had caused the policy to be discharged so as to disentitle the appellant who is the beneficiary under the policy from claiming under the policy.

Issue (1) - Whether October 1994 Premium Paid Within The Extended Period?

This issue is to be answered in the affirmative.

Issue (2) – Whether There Is Waiver On The Respondent's Part?

The respondent has placed much emphasis and significance on its first letter which is in the following terms:

MR. VEERIA A/L VENGADASALAH 18 NOV 1994
14-16-5 TINGKAT PAYA TERUBONG 3
AYER ITAM
11500 PENANG

Dear Sir/Madam

LIFE POLICY NO: 0448079
LIFE ASSURED: MR VEERIA A/L VENGADASALAH

Our records show that we have not received your remittance for the MONTHLY premium due 02-10-94 to 02-11-94. The premium in arrears amounts to RM109.40. **In accordance with the Premium Provisions, your policy has now lapsed and you have lost the valuable protection provided to you.**

The company would however be prepared to consider reinstating your policy subject to the following:

(i) Acceptance of the reinstatement of your policy by the company upon **satisfactory evidence of assurability by returning the Declaration of Good Health (overleaf) duly completed and witnessed.**

(ii) **Remittance of overdue premium inclusive of interest as at 30-11-94 amounting to RM110.10 within 30 days from the aforesaid date.** If remittance of the above amount is made after the stipulated date, your overdue premium inclusive of interest will have to be recalculated.

We strongly urge you to effect immediate reinstatement of your policy which gives you valuable protection you have afforded right from the inception for the benefit of yourself and your dependants.

Thank you

Yours faithfully,
Arab-Malaysia Eagle Assurance Berhad

- sgd-
MOHAMAD BIN MOHD NOH
General Manager (Life)

cc. Agent : JAMUNA A/P KUPPUSAMY (CO1472)
AMAB (FABIAN A/L ANTHONIMUTHU)

(Emphasis added)

The provisions governing payment of premiums and reinstatement in the third schedule of the policy state as follows:

1. Payment of Premiums

(a) All premiums shall be paid in accordance with the First Schedule and subject to the provisions contained in this Policy. The date on which a premium falls due shall be the Premium Date;

(b) all premiums are payable on or before their Premiums dates to the Company's Head Office or its various branches or other offices duly authorised by the company to accept payment of premiums;

(c) the frequency of premium payments may be changed only by written request from the Policy Owner and on approval by the company; and

(d) after payment of the first premium, failure to pay a premium on or before its Premium date to the Company shall constitute a default in payment of premium. A Grace Period of thirty (30) days from its Premium Date will be allowed for payment of each premium after the first, during which period this policy will remain in force. **If any premium remains unpaid at the end of its Grace Period, the Policy shall lapse and have no further effect except as may be provided under Section 6 of this Schedule.**

2. Reinstatement

If a premium is in default beyond the Grace Period allowed and if this Policy has not been surrendered for its surrender value, it may be reinstated at the Company's discretion upon the following conditions:

(a) A written application for reinstatement;

(b) production of evidence of assurability satisfactory to the company;

(c) payment of all overdue premiums with interest;

(d) repayment or reinstatement of any loan indebtedness outstanding at the Premium Date of the premium in default with interest.

Interest on premium and loan indebtedness will be charged at a rate to be determined by the Company from the Premium Date to the date of reinstatement and shall be compounded yearly. (emphasis added)

As mentioned in the earlier part of this judgment, the deceased passed way in a road accident on 17 November 1994. Thus, it was impossible for the deceased to comply with the first condition for the reinstatement of the policy which required the deceased to furnish to the respondent a declaration of good health. The second condition which required the payment of the arrears of premium was also not complied with. Nevertheless, the relevant portion of the deceased's passbook as set out in the earlier part of this judgment shows that a sum of RM60 was banked into the deceased's account on 4 November 1994 whilst the deceased was still alive. If this amount had been credited the very same day into the respondent's account there would have been only a delay of two days over and above the grace period in respect of the payment of the premium for the month of October 1994 as the grace period had expired on 2 November 1994.

However, the entries in the deceased's passbook showed that the Bank Simpanan Nasional only debited a sum of RM55.45 from the deceased's account purportedly, representing the premium for the month of October 1994, and this sum was only credited into the account of the respondent on 16 December 1994 which resulted in a delay of 60 days.

I shall now deal with the law relating to waiver. It has been said that "waiver" is a vague term used in many senses (See *Ross T. Smyth & Co. Ltd. v. Bailey Son & Co* [1940] 3 All ER 60 at 70, HL, per Lord Wright). It is sometimes used in the sense of an election, as where a person decides between two mutually exclusive rights; thus in certain circumstances a plaintiff may waive a claim in tort and bring a quasi-contractual claim. It is also used to describe the situation where a party prevents performance or announces that he will refuse performance or loses an equitable right by laches. In the law of contract, however, it is most commonly used to describe the process whereby one party voluntarily grants a concession to the other party by not insisting upon the precise mode of performance provided for in the contract, whether before or after any breach of the term waived. (See *Halsbury's Laws of England*, 4th edn, para 571, p. 394).

The following excerpt on the form of waiver contained in para. 574, p. 396 of *Halsbury's Laws of England*, 4th edn is also relevant:

> Waiver may be express or implied from conduct, but in either case it must amount to an unambiguous representation arising as the result of a positive and intentional act done by the party granting the concession with knowledge of all the material circumstances. Furthermore, it seems that for a waiver to operate effectively the party to whom the concession is granted must act in reliance of the concession.

In *Banning v. Wright (Inspector of Taxes)* [1972] 2 All ER 987 at 999, [1972] 1 WLR 972 at 980, HL, Lord Hailsham of St. Marylebone made the following observation when discussing waiver in a revenue statute:

> Waiver is the abandonment of a right. Viewed from one aspect of the matter the right abandoned is conferred by the conduct of the appellant in breach. Viewed from another aspect the same right is conferred by the term of the contract which has been broken by the appellant. When a contract is broken the injured party in condoning the fault may be said either to waive the breach or to waive the term in relation to the breach. What in each case he waives is the right to rely on the term for the purpose of enforcing his remedy for the breach. I cannot construe 'waiver' as only applicable to the total abandonment of any term in the lease both as regards ascertained and past breaches, and as regards unascertained or future breaches. I am equally unable to regard a compromise forgiving a past default as the same thing as a consent licensing in advance conduct for which a prior license is required by the terms of the contract.

Applying the relevant principles of waiver to the facts in the instant case, in particular, the principle that there must be a voluntary grant of a concession whether before or after the breach of the term alleged have been waived by one party to the other party by not insisting on the precise time for performance provided for in the contract the only conclusion that I can draw is that there is no waiver because on 16 December 1994 when the respondent accepted the late payment of premium for the month of October 1994 which was banked into the deceased's Giro account with Bank Simpanan Nasional on 4 November 1994 the respondent was not aware that the deceased had in actual fact already passed away in a road accident on 17 November 1994.

Furthermore, where an act has to be done periodically, the fact that a party has in the past not made objection to its being done irregularly, does not necessarily justify the assumption that similar irregularities will be waived in the future. (See *Cape Asbestos Co. Ltd. v. Lloyds Bank Ltd* [1921] WN 274; *Bird v. Hildage* [1948] 1 KB 91, [1947] 2 All ER 7, CA).

Where the consideration for life insurance is a premium payable periodically, with a provision that the policy is to be terminated on failure to pay any premium on the due date or within the days of grace, it seems the contract must properly be regarded as a continuing contract for the life of the assured subject to defeasance on non-payment of any premium, rather than as an insurance for a period with a periodic right of renewal. In any case the insurers are bound to accept the payment of the periodic premiums, if proffered by the assured by the due date or within the days of grace, and to continue the

insurance until the assured's death, unless there is some provision in the contract entitling them to terminate the insurance before that date. If any premium is not paid by the due date or within the days of grace, the policy terminates with effect from the date when payment was due. (See *Salvin v. James* [1805] 6 East 571 at 582, 583; *Acey v. Fernie* [1840] 7 M & W 151; and *Pritchard v. Merchants' and Tradesman's Mutual Life Assurance Society* [1858] 3 CBNS 622).

If the policy money is paid in the belief that the policy has remained in effect, the money so paid can be recovered by the insurers as money paid by mistake. (See *Kelly v. Solari* [1841] 9 M & W 54).

It follows, therefore, that the appellant's argument that the respondent has by its previous conduct in accepting late payments of premium waived the strict compliance by the deceased of the time stipulated for the payment of the monthly premium is also without merits and ought to be rejected. Furthermore, at the time of his death the deceased not only did not pay his premium for the month of October 1994 within the 30 days grace period he also failed to pay his premium for the month of November 1994.

Issue (3) – Has The Policy Been Discharged By The Deceased's Death? What is the effect of the death of the deceased on the policy?

Cik Chang Mei Leng, learned counsel for the respondent has contended that the policy has been discharged upon the death of the deceased. I shall now deal with the law relating to this issue.

Para 615 on p. 422 of *Halsbury's Laws of England*, 4th edn, states as belows:

(viii) Effect of Death

> **615. Death.** In considering the effect of death on rights under a contract it is necessary to distinguish between discharge of the contract itself and discharge of an accrued right of action for breach of contract.
>
> The general rule is the death of one of the parties to a contract does not discharge the contract; thus the personal representatives of the deceased party may complete performance and sue for the exchange bargained for, and, indeed, they are bound to complete performance at the demand of the other party so far as the assets of the estate will allow. **But where the contract is of a personal nature the general rule does not apply and such a contract will be discharged as an important element in the contract.**
>
> Where, however, there is already a vested right of action for breach of contract the death of either party has no effect upon it, whether or not it arose from a contract of a personal nature. (emphasis added)

As the death of the deceased made it impossible for the deceased to comply with the two conditions for the reinstatement of the policy the policy is, consequently, discharged by the death of the deceased on 17 November 1994.

Conclusion

In my judgment the learned Sessions Court Judge was correct in her interpretation of the two provisions of the policy as set out above and s. 40 of the Contracts Act 1950. She rejected the submission of the learned counsel for the appellant that the previous conduct of the respondent in accepting late payment of the premium for the month of October 1994 from the deceased is to be construed to mean that the policy was still in force and had not been terminated by the respondent pursuant to s. 40 of the Contracts Act 1950 and dismissed the appellant's claim.

In the premises, I dismissed the appellant's appeal with costs.